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<b>F.F., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1198</b>
	)	<b>Issued: April 19, 2021</b>
	)	
<b>U.S. POSTAL SERVICE, PROCESSING &amp;</b>	)	
<b>DISTRIBUTION CENTER, Los Angeles, CA,</b>	)	
<b>Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

<sup>2</sup> The Board notes that following the April 25, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$82,137.37 for the period January 1, 2012 through June 23, 2018, for which she was not at fault, as she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On August 11, 2010 appellant, then a 64-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she had developed bilateral basal joint arthritis and carpal tunnel syndrome due to factors of her federal employment. On November 19, 2010 OWCP accepted her claim for bilateral carpal tunnel syndrome and right cubital tunnel syndrome. Appellant stopped work on May 7, 2011. She underwent a right carpal tunnel release and right cubital tunnel release surgery on June 20, 2011. OWCP paid appellant wage-loss compensation on the periodic rolls, effective August 8, 2011. On August 27, 2012 appellant underwent a left carpal tunnel release surgery. On May 1, 2013 she returned to light-duty work four hours per day. Appellant accepted a light-duty position as an opening unit clerk working four hours per day on June 7, 2013. On July 28, 2013 she stopped work.

By decisions dated December 3, 2013 and April 14, 2014, OWCP denied appellant's claim for total disability compensation. However, it continued to pay wage-loss compensation benefits for four hours per day.

On June 9, 2017 appellant accepted a light-duty position as a clerk working eight hours per day. Beginning on June 26, 2017 appellant filed a claim for compensation (Form CA-7) for disability from work, noting that she had worked eight hours on June 17 and 20, 2017 and thereafter her work hours were reduced to six hours per day or less.

By decision dated October 30, 2017, OWCP denied appellant's claims for compensation finding that she was capable of working eight hours per day with restrictions. On November 6, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 10, 2018, an OWCP hearing representative reversed the October 30, 2017 decision, finding that OWCP failed to properly follow the provisions of 20 C.F.R. § 10.500(a).

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

On May 11, 2018 appellant filed a claim for a schedule award (Form CA-7).

On July 2, 2018 OWCP received a completed Federal Employees Retirement System (FERS)/(SSA) dual benefits calculation form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since January 2012. SSA reported that: beginning January 2012 appellant's monthly SSA rate with FERS was \$1,708.60 and without FERS was \$694.40; from December 2012 through November 2013 her monthly SSA rate with FERS was \$1,737.60 and without FERS was \$706.20; from December 2013 through December 2014 her monthly SSA rate with FERS was \$1,763.60 and without FERS was \$716.70; from January 2014 through November 2014 her monthly SSA rate with FERS was \$1,764.70 and without FERS was \$716.70; from December 2014 through November 2015 her monthly SSA rate with FERS was \$1,794.60 and without FERS was \$728.80; from December 2015 through November 2016 appellant's monthly SSA rate with FERS was \$1,794.60 and without FERS was \$728.80; from December 2016 through November 2017 her monthly SSA rate with FERS was \$1,799.90 and without FERS was \$730.90; beginning December 2017 her monthly SSA rate with FERS was \$1,835.80 and without FERS was \$745.50.

In a July 12, 2018 letter, OWCP informed appellant that she had been receiving dual FERS and SSA benefits. It further informed her that her FECA benefits must be adjusted based on the FERS portion of SSA benefits that were attributable to federal service. OWCP indicated that appellant's FECA benefits would be reduced from \$1,717.00 to \$710.57 every 28 days.

On August 3, 2018 OWCP notified appellant that it made a preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$82,137.37 because she received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits for the period January 1, 2012 through June 23, 2018. It noted that the SSA had confirmed that a portion of her SSA age-related retirement benefits were attributed to her years of federal service as an employee under the FERS retirement program and that portion required an offset of her FECA compensation benefits until June 23, 2018 when her monthly wage-loss compensation was adjusted. OWCP explained that it had calculated the overpayment of compensation by determining the difference between appellant's SSA benefit rates with and without FERS for each period, and then multiplying that amount by the number of days in each period. The FERS offset calculation worksheet indicated that OWCP had utilized a 28-day FERS offset amount of \$936.18 from January 1 through November 30, 2012, \$952.06 from December 1, 2012 through November 30, 2013, \$966.37 from December 1 through 31, 2013, \$967.38 from January 1 through November 30, 2014, \$983.82 from December 1, 2014 through November 30, 2015, \$983.82 from December 1, 2015 through November 30, 2016, \$986.77 from December 1, 2016 through November 30, 2017, and \$1,006.43 from December 1, 2017 through June 23, 2018. Using these figures, OWCP calculated that the total overpayment amount was \$82,137.37. It found that appellant was at fault in the creation of the overpayment. OWCP requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it advised appellant that, within 30 days of the date of the letter, she could request a final decision based on the written record or request a precoupment hearing.

On August 14, 2018 appellant noted her disagreement regarding the overpayment and requested a precoupment hearing on the issues of fault and waiver of recovery of the overpayment before OWCP's Branch of Hearings and Review.

During the hearing held on January 14, 2019, appellant testified regarding the alleged overpayment of compensation. She noted her disagreement that she was at fault in the creation of the overpayment. Appellant indicated that she would submit the Form OWCP-20 and supporting financial documentation. She noted that she was currently working four hours per day and was covered under FERS.

In a letter dated March 11, 2019, counsel asserted that he had provided all pertinent information regarding the overpayment including tax returns, social security data, and bank statements. Attached was a February 11, 2019 completed Form OWCP-20 and supporting financial documentation. She listed her monthly income as \$1,763.00 in SSA benefits. Appellant listed her monthly expenses as \$500.00 for food and \$100.00 for clothing. She indicated that her utilities and other household expenses were attached. Appellant listed a monthly payment of \$44.60 to Stratford Career Institute, and indicated that all of her other monthly expenses were on the attached sheets. She reported that she had two dependents, her 30-year-old grandson and her 52-year-old cousin and that she had \$80.00 in cash and no other assets. Appellant submitted evidence establishing that in January 2019 her mortgage, insurance, and property tax totaled \$763.35 per month. She noted a monthly car payment of \$340.57 and submitted a February 1, 2019 statement for automobile insurance in the amount of \$160.21. Appellant also submitted monthly billing statements for utilities, including cable, water, sewer, street sweeping, trash collection, telephone, internet, electric, and gas. She also provided receipts for car repairs on January 28 and 29, 2019, as well as proof of payment of \$15.92 for a newspaper subscription and a November 26, 2018 podiatrist bill for \$178.00. She further submitted TransUnion and Equifax credit reports as well as earnings and leave statements for pay periods ending January 11, 25, and February 8, 2019 showing a net pay of \$1,118.42, \$849.66, and \$1,121.61 respectively. Appellant also submitted a November 28, 2018 Thrift Savings Plan statement indicating that her balance as of November 27, 2018 was \$34,569.33. OWCP also received appellant's tax returns from 2009 through December 2018 and bank statements from 2013 through 2018.

By decision dated April 25, 2019, OWCP's hearing representative finalized the preliminary determination that appellant had received an overpayment in the amount of \$82,137.37 for the period January 1, 2012 through June 23, 2018. He determined that appellant was without fault in the creation of the overpayment. OWCP's hearing representative denied waiver of recovery of the overpayment as there was no evidence that recovery would defeat the purpose of FECA. He found appellant's monthly income beginning June 20, 2019, when her schedule award ended, would be \$4,870.72 including \$876.27 per month in wage-loss compensation based on an average of eight weeks of wage-loss compensation from August 4 through September 28, 2018, \$2,231.45 per month in earnings based on the \$514.95 weekly average of her three recent pay stubs from the employing establishment for the period January through February 8, 2019, and \$1,763.00 in SSA benefits. OWCP's hearing representative determined that appellant's monthly expenses totaled \$2,619.49 including mortgage of \$763.35, automobile loan of \$340.57, telephone costs of \$133.00, cable television costs of \$155.97, city utilities of \$62.55, automobile insurance of \$160.21, an average of monthly car repairs of \$51.75, home gas utility of \$194.23, monthly average of utilities of \$87.64, electricity monthly average of \$54.30, newspaper cost of \$15.90 per

month, food \$500.00 per month, and clothing \$100.00. He found no documentation supporting the claimed \$44.60 per month in tuition claimed and discounted this amount. OWCP's hearing representative found this resulted in approximately \$2,251.00 in monthly income over debt, which exceeded the statutory amount of \$50.00. He further found there was no evidence that recovery would be against equity and good conscience. OWCP's hearing representative required recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup>

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.<sup>6</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds appellant received an \$82,137.37 overpayment of compensation for the period January 1, 2012 through June 23, 2018 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without appropriate offset.

In its April 25, 2019 decision, OWCP found that an overpayment of compensation was created for the period January 1, 2012 through June 23, 2018. The overpayment determination was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>8</sup> The information

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> 5 U.S.C. § 8116(d)(2); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during the period January 1, 2012 through June 23, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related SSA retirement benefits that were attributable to federal service. SSA provided their rate with FERS, and without FERS for specific periods commencing January 1, 2012 through June 23, 2018. OWCP provided its calculations for each relevant period based on a FERS offset calculation worksheet and in its August 3, 2018 preliminary overpayment determination.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period January 1, 2012 through June 23, 2018 and finds that an overpayment of compensation in the amount of \$82,137.37 was created.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>10</sup> The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>11</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>12</sup> An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>13</sup>

Additionally, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial

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<sup>9</sup> *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>10</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

<sup>11</sup> *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>12</sup> 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

<sup>13</sup> *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>14</sup>

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.<sup>15</sup> Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.<sup>16</sup>

OWCP's procedures provide that a finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary. The burden is on the overpaid individual to show that the expenses are reasonable and needed for a legitimate purpose. If the claims examiner or hearing representative determines that the amount of certain expenses is not ordinary and necessary, he or she must state, in writing, the reasons for the determination. The determination should be supported by rationale, which may include utilizing statistics from the Bureau of Labor Statistics that show that the overpaid individual's expenses exceed that of the range for the general population. OWCP should be careful to avoid counting an expense twice when totaling the overpaid individual's ordinary and necessary living expenses. For example, if the overpaid individual's credit card debt is already calculated as a fixed and miscellaneous living expense, the credit card expense(s) should not be added again as consumer debt expense. If the amount is added again, it would result in an excessive total for the overpaid individual's ordinary and necessary living expenses, and would make the individual appear less able to repay his or her overpayment than would actually be the case. Furthermore, OWCP should ensure that the monthly expense used for each credit card reflects only the minimum payment required by the creditor. The minimum amount should be verified, if necessary, by requiring the overpaid individual to submit copies of his or her monthly billing statement(s).<sup>17</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>18</sup> OWCP considered appellant's financial information, as reported in appellant's

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<sup>14</sup> 20 C.F.R. § 10.437(a)(b).

<sup>15</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>16</sup> *Id.* at § 10.438(b).

<sup>17</sup> *Supra* note 11 at Chapter 6.400.4(b)(2).

<sup>18</sup> 20 C.F.R. § 10.436.

statements, to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

The Board finds that OWCP properly determined that appellant did not require substantially all of her income to meet ordinary and necessary living expenses. Based on appellant's February 11, 2019 overpayment recovery questionnaire and the record, her total monthly income of \$4,870.72 minus \$2,619.49 in monthly debts, resulted in approximately \$2,251.00 in income over debt each month. Thus, based on appellant's statements and the record, appellant's monthly income exceeded her ordinary and necessary living expenses by more than \$50.00, she did not need substantially all of her income for ordinary and necessary living expenses such that recovery would defeat the purpose of FECA.<sup>19</sup>

Additionally, appellant did not submit evidence to substantiate that she would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment she gave up a valuable right or changed her position for the worst. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.<sup>20</sup>

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has not established that OWCP abused its discretion by denying waiver of recovery of the overpayment.<sup>21</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of OWCP's regulations provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as the error is discovered or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.<sup>22</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$600.00, OWCP explained how it considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits to minimize hardship, while liquidating the debt, as appellant had financial resources

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<sup>19</sup> *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>20</sup> *N.J.*, *supra* note 13; *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>21</sup> *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

<sup>22</sup> 20 C.F.R. § 10.441(a); *A.F.*, *supra* note 10; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).



sufficient for more than ordinary needs.<sup>23</sup> Thus, OWCP did not abuse its discretion in setting the rate of recovery.<sup>24</sup> The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$600.00 every 28 days.

### **CONCLUSION**

The Board finds that appellant received an \$82,137.37 overpayment of compensation for the period January 1, 2012 through June 23, 2018, for which she was not at fault, as she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$600.00 every 28 days from her continuing compensation payments.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>23</sup> *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

<sup>24</sup> *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).